

Atty Gen. Op. No. 09-1307

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November 6, 2009

Mr. David C. Pleasanton
35 West Mt. Vernon Street
Smyrna, DE 19977

**RE: Freedom of Information Act Complaint
Against Town of Smyrna**

Dear Mr. Pleasanton:

On August 7, 2009, the Delaware Department of Justice ("DDOJ") received your emailed complaint that the Town of Smyrna ("the Town") violated the Freedom of Information Act ("FOIA") by refusing to release to you some of the records of the Town Ethics Commission concerning a complaint against you. On September 2, 2009, the DDOJ forwarded your letter to the Town. We received its response on September 15, 2009. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

On July 20, 2009, the Town received your email request to inspect and copy "Ethics Commission records related or pertaining to any complaint filed against [you]." By a letter, undated, the Town responded that it was producing notes for the March 19

and April 2, 2009 meetings of the Ethics Commission, but that other records were being withheld.

RELEVANT STATUTES

All public records must be made available to the public for inspection and copying unless they are "not deemed public" under one of the exceptions listed in 29 *Del. C.* § 10002(g). The § 10002(g) exceptions include:

(3) Investigatory files compiled for civil . . . law enforcement purposes . . . ;"

(6) Any records specifically exempted from public disclosure by statute or common law[.]

DISCUSSION

The Town's position is as follows:

1. Pursuant to Section 2-207(h) of the Town of Smyrna Code of Conduct, all proceedings before the Ethics Commission are confidential and, therefore are protected under 29 *Del. C.* § 10002(g)(6), as records specifically exempted under statute.
2. The withheld records are civil law enforcement records exempt from disclosure under 29 *Del. C.* § 10002(g)(3).
3. Certain of the withheld records are subject to attorney client or attorney work product privilege and, therefore are exempt under the common law as provided by 29 *Del. C.* § 10002(g)(6).

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Your position is that, because only you would see the records, confidentiality is not an issue.

Section 2-207(h)(4) of the Town of Smyrna Code of Conduct provides as follows:

Confidentiality procedures. The . . . ethics commission shall . . . establish such procedures as . . . may be necessary to prevent the disclosure of any record of any proceedings or other information received by the ethics commission, except as permitted by this chapter.

Therefore, all records of the Ethics Commission are confidential by statute and are exempt from FOIA disclosure by 29 *Del. C.* § 10002(g)(6). As a result, we do not need to address the Town's contentions that the records at issue constitute a law enforcement investigatory file or are subject to a common law privilege.

As to your claim that confidentiality is not an issue because only you would see the file, FOIA provides for limited disclosure only of criminal records, and the files you request are not criminal records. 29 *Del. C.* § 10002(g)(4). If we agreed that Ethics Commission files were subject to disclosure under FOIA, the Town would be obligated to disclose the records pertaining to you not just to you but to any requesting member of the public.

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CONCLUSION

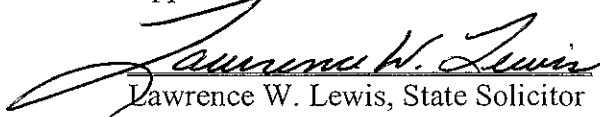
For the reasons stated herein, we find that the Town of Smyrna has not violated the Freedom of Information Act in withholding from disclosure files of the Town Ethics Commission pertaining to complaints made about your conduct.

Sincerely,



Judy Oken Hodas
Deputy Attorney General

Approved:


Lawrence W. Lewis, State Solicitor

cc: Katrina Barbour, Opinion Coordinator ✓
Erika Schrader, Esquire